PUBLIC PROSECUTOR

v.

TEE AN CHUAN

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[FT CRIMINAL TRIAL NO. 59-3-86]
22 DECEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Offence under s. 409 of the Penal Code - Appropriate punishment - Amount involved and other factors to be considered - Plea of guilty - Sentence to reflect this.*

Koperasi Belia Bersatu Berhad (KOSATU)was founded by the accused in 1976. The accused was its chairman until his resignation in July 1986.

The accused was in control of the management of KOSATU and had total dominion over all monies collected.

The accused was a director and a major shareholder of Tee Holdings Sdn. Bhd. Tee Holdings signed an agreement with Tan Sri S.O.K. Ubaidulla to buy a piece of land for RM3,500,000. Part of the purchase price was paid out from the funds of KOSATU.

The accused entered into another agreement with Mount Pleasure Corporation Sdn. Bhd. to buy an apartment at Penang. The accused used KOSATU's funds without authority to pay up part of the purchase price.

The accused was charged under s. 409 of the Penal Code. He pleaded guilty.

Held:

[1] The guidelines laid down in *Reg. v. Barrick* applies for ss. 406, 407 and 408 of the Penal Code. It also applies to s. 409 but with the additional stipulation or rider in mind - that the length of the terms of imprisonment recommended in the guidelines be made twice as long.

[2] In passing sentence the sum involved is not the only factor to be considered and the Court should consider other factors (if any).

[3] In determining the proper level of sentencing the Court should have to consider the plea of guilty.

[4] The money dishonestly taken was used by the accused for his own benefit. The effect of the defalcations on the victims, who were the depositors of KOSATU, was disastrous - never was there so much human suffering among so many poor individuals. Taking all factors into account including the mitigation plea, this Court must, nevertheless, pass a sufficiently substantial term of imprisonment to mark publicity the gravity of this mean offence.

[Accused sentenced to 12 years' imprisonment. In addition a fine of RM50,000; in default a further 6 months' imprisonment.]

Cases referred to:

Reg. v. Barrick [1985] 81 Cr App R 78
Lim Kee Butt v. PP [1953] MLJ 209
Koh Seng Wah v. PP [1966] 1 MLJ 12
PP v. Khairuddin [1982] 1 MLJ 331
Wickrasooriya v. PP [1964] MLJ 281

Mohamed Adil v. PP [1967] 1 MLJ 151
Shanmuganathan v. PP [1967] 1 MLJ 204
Dato' Harun v. PP [1978] 1 MLJ 240
Yanasengam v. PP [1978] 1 MLJ 269
Tan Sri Tan Hian Tsin v. PP [1979] 1 MLJ 73
PP v. Muthu Lingam [1986] CLJ (Rep) 603
Lee Yew Siong v. PP [1973] 1 MLJ 37
Abdul Kadir v. PP [1984] 1 MLJ 80
Reg. v. Davies [1978] 67 Cr App R 207

Legislation referred to:
Penal Code, ss. 406, 408, 409

Other source referred to:
Without Fear or Favour, Tan Sri Dr. Tan Chee Khoon, The Star newspaper

For the public prosecutor - Mohtar Abdullah (Tan Hock Chuan with him)
For the accused - Ronald Khoo; M/s. Shearn Delamore & Co.

JUDGMENT

NH Chan J:

Much of what I have said in *PP v. Mohammad Abdullah Ang*, Selangor Criminal Trial 59-1-86, last week on the principles and policy of sentencing in breach of trust cases apply as much as to this case. Any Judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this kind of case. They are:

> the **retributive factor** - to show the Courts' disapproval or abhorrence, on behalf of society, of this type of criminal conduct, and
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> the **deterrent factor** - to discourage likely offenders.

I have also in *Mohammad Abdullah Ang* generally approved and adopted the guidelines given by the English Court of Appeal in *Reg. v. Barrick* [1985] 81 Cr App R 78 on the proper level of sentence to be imposed in breach of trust cases. The guidelines are summarised in the headnote, thus (at p. 79):

> In these cases in general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. The Court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. Where amounts involved are less than £10,000 terms of imprisonment ranging from the very short up to 18 months are appropriate. Cases involving sums between £10,000 and £50,000 will merit a term of about 2 or 3 years' imprisonment. Where greater sums are involved, e.g., over £100,000, then a term of 3½ to 4½ years' imprisonment would be justified.

I am driven to conclude that the *Barrick* guidelines provide a useful guide to local sentencing Courts because Malaysian case law on the sentences that have been passed in breach of trust cases (excepting those on s. 409 offences) appears to be in line with the recommendations suggested in the guidelines. One only has to take a look at the three categories in the guidelines and at the respective contemporary Malaysian cases which I have adumbrated below to know this (s. 409 cases have been excluded from this comparison):

> (i) **Where the amounts involved are less than £10,000 - prison terms ranging from the very short up to 18 months are appropriate.**
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> The Malaysian cases are:
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> *Lim Kee Butt v. PP* [1953] MLJ 209 (where the amount involved was RM70; 1 month plus RM100 fine) (s. 406).

Koh Seng Wah v. PP [1966] 1 MLJ 12 (where the amount was RM18,000; 1 year's imprisonment) (s. 408).

PP v. Khairuddin [1982] 1 MLJ 331 (where the sum was RM20,000; 18 months' imprisonment) (s. 408).

In the light of these considerations and with the benefit of hindsight, it seems to me that the sentence imposed by the Court in *Wickrasooriya v. PP* [1964] MLJ 281 (where the sums were RM39.70 and RM12 (s. 408); 3 years imprisonment) was excessive and in *Mohamed Adil v. PP* [1967] 1 MLJ 151 (where the amount obtained, RM1,457.50, was not small especially in those days (s. 406); 3 months' imprisonment reduced to RM500 fine) was too lenient. As for *Shanmuganathan v. PP* [1967] 1 MLJ 204, it can be put as a case where the amount of money obtained was small; the amount stated in the charge was RM150 (s. 408).

(ii) **Cases involving sums between £10,000 and £50,000 - merited a term of about 2 or 3 years' imprisonment.** There appears to be no s. 406, 407 or 408 reported Malaysian case in this category.

(iii) **Where greater sums are involved, e.g., over £100,000 - a term of 3½ to 4½ years' imprisonment is justified.** The only reported Malaysian case under this category (s. 409 excluded) is:

Dato Harun v. PP [1978] 1 MLJ 240 (where 3 million ordinary shares and RM1 million Debenture Stocks were involved; the first and second appellants were sentenced to 3 years' imprisonment and, the third appellant was fined RM10,000 due to exceptional circumstances) (s. 406). 3 years is the maximum under s. 406.

I wrote in *Mohammad Abdullah Ang*, thus: (at pp. 8, 9):

> ... there seems to be some compatibility (s. 409 excepted) with regard to the maximum sentence that could be imposed between the United Kingdom and local legislations. In the light of these considerations it seems to this Court that the *Barrick* guidelines on the proper level of sentences to be imposed are useful to local sentencing Courts for offences under ss. 406, 407 and 408 of the Penal Code as the maximum length of the sentence of imprisonment which could be imposed in those sections is more or less equivalent to the maximum sentence in the United Kingdom provisions.

On the other hand, the punishment for an offence under s. 409 of the Penal Code had always been very severe. The crime is considered by the legislature as very grave criminal conduct and the punishment, in order to fit the crime, is made especially severe. It used to be "imprisonment for life, or ... imprisonment for a term which may extend to ten years" but it is now "imprisonment for a term which may extend to twenty years"; see Penal Code (Amendment and Extension) Act 1975; the amendment took effect from 31 March 1976. The explanatory statement to the Bill (which is reproduce in *Yanasengam v. PP* [1978] 1 MLJ 269 says:

> ... these amendments are for the purpose of removing a curious anomaly created by an amendment to the Code by the Criminal Justice Ordinance, 1953, which abolished penal servitude. Penal servitude was a custodial sentence with different attributes from imprisonment. In the result, those sections of the Code providing the punishment of penal servitude for life were amended to read 'imprisonment for life'. Another section of the Ordinance provided that a sentence of imprisonment for life should be deemed for all purposes to be a sentence of imprisonment for 20 years. Before the 1953 amendment, many sections creating the more serious offences presented the Court with the alternative of 'penal servitude for life or imprisonment for a term which may extend to 10 years'. The amendment created a situation in which the maximum sentence under these sections, although expressed to be 'for life', was 20 years, to which there was an alternative sentence not exceeding 10 years. The Federal

> Court discovered the lacuna, and held that while a Court could impose a sentence of 20 years it could not pass any sentence of between 10 and 20 years. To overcome this difficulty it is proposed to make 20 years the maximum prison sentence which can be passed for offences at present punishable with imprisonment for life, and to delete all reference to alternative sentences of imprisonment ...

As I have said in *Mohammad Abdullah Ang* (at p. 9), "the maximum punishment for (a s. 409) offence is twice the length of the maximum of the harshest of the United Kingdom punishment in breach of trust cases. Nonetheless, the *Barrick* guidelines are still useful but with this additional stipulation or rider in mind - that the length of the terms of imprisonment recommended in the guidelines be made twice as long." Ang was given 8 years and fined RM100,000. The amount involved was RM338,808.80 which would place it under the third category of the guidelines. By doubling the length of the suggested prison term for that category in the *Barrick* guidelines the sentence that was passed in Ang's case was justified; it being a s. 409 offence.

In *Tan Sri Tan Hian Tsin v. PP,* Federal Territory Criminal Trial 38/76 an appeal to the Federal Court against conviction was rejected: see *Tan Sri Hian Tsin v. PP* [1979] 1 MLJ 73, unreported, the amount involved was RM200,000. Harun J sentenced him to 5 years' imprisonment for criminal breach of trust under s. 409 of the Penal Code. Actually, if one were to apply and act under the second category of the *Barrick* guidelines, this would have merited only a term of about 2 or 3 years' imprisonment. But in view of the considerations which I have referred to in the previous paragraph the sentence that was imposed in that case would appear to be justified. This can be seen to have been achieved by adapting the guidelines to the local situation - namely, for offences under s. 409 - by doubling the length of imprisonment suggested in the guidelines.

On the other hand, in the light of the foregoing considerations and with the benefit of hindsight, it seems to me that the sentences passed by me in *PP v. Muthu Lingam* [1986] CLJ (Rep) 603 (RM100,000 (s. 409); 3 years' imprisonment) - which is a case under the second category as it has been adjusted for s. 409 - and by Hamid J in *Lee Yew Siong v. PP* [1973] 1 MLJ 37, (RM25,000 (s. 409); 2 months' imprisonment and RM2,000 fine) - which falls under the first category as it has been adapted for s. 409 - were too lenient. But the sentence of 3 day's jail and a fine of RM5,000 passed in *Abdul Kadir v. PP* [1984] 1 MLJ 80 for an offence under s. 409 was justified as the amount obtained was small; it was only RM200.

I now turn to the instant case. The following are taken from the facts which have been tendered and which were admitted by the accused.

Koperasi Belia Bersatu Berhad (KOSATU) was founded by the accused Tee An Chuan in 1976. Tee was its Chairman until his resignation in July 1986.

Tee was also a director and a major shareholder of Tee Holdings Sdn. Bhd.; Tee owns 730,999 shares and his wife, Wong Mook Yin, owns 1 share.

The money collected by the various branches of KOSATU was taken to its head office at No. 594, 596 Jalan Pudu, Kuala Lumpur where it was put into its bank account with the Jalan Pudu branch of United Malayan Banking Corporation (UMBC). In order to operate the bank account, cheques have to be signed by two out of the three authorised signatories, who were Tee, Lee Ba @ Lee Yong Shuang who is KOSATU's treasurer, and Chang Siew Kai the secretary of KOSATU.

Tee was in control of the management of KOSATU including dominion over all money collected. It was the practice of the Cooperative to have blank cheques signed beforehand by either Lee Ba or Chang Siew Kai leaving Tee as the ultimate signatory. Also, KOSATU's

Executive Committee (EXCO) which was established to exercise the function of the board of directors did not convene any meetings. Instead, Tee made decisions on his own. He would then have the minutes, which were prepared by him, of the meetings which never took place signed by the members of KOSATU's EXCO.

On 23 April 1985, Tee Holdings signed an agreement with Tan Sri S.O.K. Ubaidulla to buy a piece of land at Sungei Serdang, Kuala Lumpur for RM3,500,000. According to the terms of the contract Tee Holdings was to pay an initial sum of RM700,000. Tee Holdings, through the accused, issued a cheque for this amount on 23 April 1985 but the cheque was not cleared until 3 May 1985.

On 3 May 1985, on the instruction of the accused a cheque was made out for the sum of RM510,000 from KOSATU's account with UMBC, Jalan Pudu Branch. The cheque was cashed on the same day. Using an application form for a cashier's cheque signed by the accused, the said money was in turn used to purchase a UMBC cashier's cheque No. 006217 dated 3 May 1985 for RM510,000 in favour of Tee Holdings. This cheque was banked into the account of Tee Holdings with the Perwira Habib Bank at Petaling Jaya.

Tee Holdings was also supposed to pay the balance of RM2,800,000 within 60 days. However, the dateline for the payment of the balance was extended to 31 July 1985 on the condition that Tee Holdings pay RM65,350 compensation to Tan Sri Ubaidulla for the delay.

On the instruction of the accused a cheque for RM65,350 was issued by KOSATU out of its account with UMBC on 26 July 1985. The cheque was cashed on the same day. Using an application form for a cashier's cheque signed by the accused, the said money was in turn used to purchase a UMBC cashier's cheque No. 006561 dated 26 July 1985 for RM65,350 in favour of Tan Sri Ubaidulla and subsequently it was paid into Tan Sri Ubaidulla's account.

On 25 June 1985, the accused entered into an agreement with Mount Pleasure Corporation Sdn. Bhd. to buy an apartment which was described as Unit 1, 16th Floor, Block B, Reefs Apartment, Penang for RM567,000.

On 31 August 1986, the accused had paid RM85,050 (i.e. 15% of the purchase price) out of which RM28,350 was paid with a UMBC cashier's cheque No. 007002 dated 26 October 1985.

This RM28,350 was part of a UMBC cash cheque dated 24 October 1985 of RM30,000 drawn on KOSATU's account with UMBC on the instruction for the accused. The cheque was cashed on the same day. Using an application form for a cashier's cheque signed by the accused, a UMBC cashier's cheque No.007002 for RM28,350 dated 26 October 1985 was purchased in favour of Mount Pleasure Corporation Sdn. Bhd. and banked into its account.

From these facts it is plain that the accused was clearly entrusted, in his capacity as chairman with dominion over the total sum of RM603,700 belonging to KOSATU. He had dishonestly converted this money to his own use.

On 12 November 1986, the accused, Tee An Chuan was charged in this Court for an offence punishable under s. 409 of the Penal Code. The charge reads:

> That you between 2 May 1985 and 27 October 1985 at No. 594/596, Jalan Pudu, in the Federal Territory of Kuala Lumpur, being an agent of Koperasi Belia Bersatu Berhad, to wit, the Chairman and in such capacity entrusted with dominion over certain property, to wit, RM603,700, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

To this charge he pleaded guilty.

It has been urged on his behalf by Mr. Ronald Khoo that he had expressed an intention right from the beginning to plead guilty and that he had cooperated with the investigations. In answer to this submission, I think this passage from the judgment of Lawton LJ in *Reg. v. Davies* [1978] 67 Cr App R 207, is apposite. This is what he said:

> The appellant pleaded guilty at the trial. It was said on his behalf that it if he had not pleaded guilty the trial would have been a long drawn out one, that the public would have been put to great expense because of a long trial and the appellant, by his plea, saved the public a great deal of money. He did: but one of the problems we have to look at is to decide to what extent his plea of guilty should lead to a lower sentence than his actual defalcations called for. It is not to be overlooked that he did co-operate and pleaded guilty. On the other hand this was the kind of offence where, once the accountants had investigated the financial affairs of this firm ... there really was not much more the appellant could do but plead guilty.
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> ...We bear in mind that in some of the counts it would have been possible to put up some kind of bogus defence, but in the majority of cases once the defalcations had been discovered a plead of guilty was inevitable.

Mr. Khoo has also urged on his behalf that he had done a lot for the young people of this country. In 1975, he founded Pertubuhan Belia Bersatu. It is the second largest youth organisation in the country. He was its first president and he still is. He was vice-president and later between 1984 and 1986 became president of the World Assembly of Youth Council. In 1983, he was appointed treasurer of the World Assembly of Youth. He had by his foolishness forfeited all the good work he had done in the youth movement both internationally and locally. He has brought shame and disgrace upon himself and his family. He is mindful of the fact that his family will have to put up with the scorn and contempt of neighbours and friends. He has ruined himself. He is 42 years old. In my view, he had, however, brought these troubles upon himself. They were troubles arising from what he had done. As for the plight and disgrace which his defalcations have brought on his family, once again, I have to remind myself that these consequences arise from his own criminal misconduct. "We have had to say in this Court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take into consideration by way of reducing sentence." - by Lawton LJ in *Davies (supra)*, at p. 209.

But what about the misery and hardship, this man and those of his kind have brought to the poor who have lost everything. He had used his position of trust to make away with other people's money. The money was stolen from poor people who could ill-afford the loss. In short, this is a mean offence. And the criminals who indulge in this sort of crime are as mean as they could have been.

I quote below some excerpts from the article "*Without Fear and Favour*" by Tan Sri Dr. Tan Chee Khoon in The Star newspaper of 17 December 1986 as to give an idea of the size of the problem:

> The co-operative scandal is very serious as it involves a total deposit of about RM1.5 billion, 588,000 members and 630 branches. There must be hundreds of thousands of families who are now regretting the day that they put their money in the 24 deposit-taking co-operatives.
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> The problems in the co-operatives first surfaced in early July when payments were suspended by KOSATU. The run on KOSATU followed and on August 8, the activities of the 24 co-operatives were suspended and the assets of 136 of their directors and principal office bearers were frozen. They were also required to surrender their passports.

Seventeen accounting firms were appointed to assist in the investigation which revealed gross and widespread mismanagement of funds, fraud, conflict of interest and improper handling of funds.

KOSATU was founded in January 1977 by Tee An Chuan, and by 8 August 1986 it had 67 branches and 14,541 members scattered through [out] Peninsular Malaysia. By July 1986, its deposits totalled about RM156.1 million collected from about 52,000 depositors.

Most of the depositors are the poor who live in new villages who now see their small life time savings go up in smoke.

In a scandal of this magnitude many tragedies have already occurred. There are cases of suicide among the depositors and employees of the co-operatives.

The human suffering among the hundreds of thousands must be very great.

I must now pronounce the appropriate sentence. Before doing so, I wish to pay regard to this passage in the judgment in *Barrick, supra*, at p.82:

> The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.

Although the sum involved may in many cases provide a useful guide, it is obviously not the only factor to be considered: see *Barrick*, at p.82. In the instant case there are other factors to be considered. The following are some of the matters to which this Court will have to pay regard in determining what the proper level of sentence should be. In this case, we have the chairman of a cooperative who whilst in a position of trust, abused that trust to the extent that a large amount of money was taken and used for his own purposes. The money was taken from the very poor; individuals who could ill-afford the loss. By anybody's standards that was very grave criminal conduct. This offence, in short, is a mean offence. It is as mean as it could have been.

The money dishonestly taken was used by the accused for his own benefit. The effect of the defalcations on the victims, who are the depositors, is disastrous - never was there so much human suffering among so many poor individuals. It is certainly no consolation at all to tell the thousands of afflicted depositors that they could bring legal proceedings to recover the money that they have lost. Yet this tenuous course was advanced in *Lee Yew Siong v. PP*. (The Court, in that case, set aside the sentence of 3 years' imprisonment on an advocate and solicitor for an offence under s. 409 where the sum involved was RM25,000 and substituted a short sentence of imprisonment (2 months) and a fine of RM2,000. In his judgment, Hamid J said, at p. 37, "The appellant with an advocate and solicitor ... I do not for a moment suggest that this serious offence for which he was convicted should be viewed less seriously just because he was an advocate and solicitor. However, the Court cannot ignore the fact that he will face disciplinary proceedings and the high possibility that he will be struck off the roll of advocates and solicitors."

The Judge went on to say (pp. 37, 38): "the Magistrate also observed that the appellant knew the consequences of him misappropriating someone else's money. That is true. The appellant himself had admitted his foolishness, nonetheless, **the Court should also consider other penalties he has to suffer consequent upon his conviction.** The stigma of the conviction for an offence such as this and of being struck off the roll will have to be borne by him the rest of his life." (emphasis supplied)

Compare this with the way in which Lawton LJ dealt with a similar situation: see *Davies* (*supra*), at pp. 208, 209:

> As a result of what the Law Society's accountants found the appellant was summoned before the Disciplinary Committee of the Law Society and, as was inevitable, he was struck off the Roll of solicitors. That was in June 1975. He was a ruined man. He was then aged 54. He could not practise his profession and, until such time as the Law Society gave him leave to do so - and it was unlikely that they would for a very long time - he could not even work as a solicitors' clerk. He had, however, brought these troubles upon himself. They were troubles arising from what he had done.)

(*supra*). This is what the Judge said (p. 37): "As for the loss suffered by the complainant, he is at liberty to institute civil proceedings to recover the sum in respect of which the appellant dishonestly misappropriated."

I must also not forget the impact this type of crime has on the public and public confidence.

I have taken all factors into account including his mitigation plea which was urged so ably on his behalf by Counsel. I have also carefully and anxiously considered all the other matters that could be put in his favour and after taking into account his guilty plea (but there really was not much more he could do but to plead guilty once the defalcations had been discovered) and the fact that he is a first offender (but then in almost every case of breach of trust the accused is a first offender), I have now to pass an appropriate sentence. Despite the great punishment that offenders of this sort bring upon themselves, the Court must, nevertheless, pass a sufficiently substantial term of imprisonment to mark publicly the gravity of this mean offence.

In my judgment, the appropriate sentence for this mean offence is imprisonment for 12 years and a fine of RM50,000 in default of which there will be imprisonment for a further six months. The imprisonment is to take effect from 12 December 1986. The sentence is meant to be punitive. It is meant to reflect this Court's abhorrence of this type of mean criminal conduct. It is a sentence passed in the interest of the public. It is also meant to deter others who are minded to embark on so mean a crime.

Also found at [1987] 1 CLJ 304